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In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writs Of Certiorari
To The United States Courts Of Appeals
For The Fourth and Ninth Circuits

BRIEF OF INTERFAITH COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

Robert D. Fram
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111

Counsel for Amici Curiae Interfaith Coalition

Robert Long
Counsel of Record
Ligia Markman
Karun Tilak
Michael Baker
Andrew Guy
COVINGTON & BURLING LLP
850 Tenth Street, N.W.
Washington, DC 20001-4956
rlong@cov.com
(202) 662-6000

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INTEREST OF *AMICI CURIAE* INTERFAITH COALITION

Amici are a coalition of individuals and organizations of diverse religions.[1] Although they profess different faiths, they are united in the belief that religious tolerance is critical to the safety and well-being of our local and national community. Because Section 2(c) of President Trump's Executive Order No. 13,780 (March 6, 2017) ("Executive Order") discriminates on the basis of religion, the Order is anathema to this core tenet that all members of our coalition share.

Amici include:

- Congregation B'nai Jeshurun, a nonaffiliated Jewish synagogue in New York City.
- The Muslim Public Affairs Council, a public service agency working for the civil rights of American Muslims, for the integration of Islam into American pluralism, and for a positive, constructive relationship between American Muslims and their representatives.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. A letter from Petitioners' counsel consenting to the filing of all timely amicus briefs, and written consent from Respondents' counsel to the filing of this brief, have been submitted to the Clerk. Unless stated otherwise, *Amici* are acting on their own behalf, and not on behalf of any organizations with which they are associated.

- The National Council of Churches, a community of Christian churches encompassing 40 million Christians in over 100,000 congregations from 38 diverse member communions that recognizes the importance of interreligious relationships and has worked to strengthen partnerships between different faith groups to reduce suspicion and anti-Muslim and anti-Semitic sentiment in society in a post-9/11 world.
- The Right Reverend Sally Dyck, Bishop of the Northern Illinois Annual Conference of the United Methodist Church. The Northern Illinois Annual Conference encompasses more than 370 churches and 30 new faith communities spanning the upper one-third of the state of Illinois.
- The Right Reverend Andrew Dietsche, the Episcopal Bishop of New York. The Episcopal Diocese of New York is made up of over 200 congregations encompassing Manhattan, the Bronx, and Staten Island in New York City, and the counties of Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester in the state of New York.
- The Right Reverend Allen K. Shin, Bishop Suffragan of the Episcopal Diocese of New York.
- The Right Reverend Mary D. Glasspool, Bishop Assistant of the Episcopal Diocese of New York.
- The Right Reverend Mariann Edgar Budde, Bishop of the Episcopal Diocese of Washington, which includes Washington, D.C. and the

counties of Montgomery, Prince George's, Charles, and St. Mary's in Maryland.

- Imam Abdul Malik Mujahid, a Muslim imam actively involved in interfaith work. Imam Mujahid has served as Chairman of the Parliament of the World's Religions and on the Council of Foreign Relations' Independent Task Force on Civil Liberties and National Security. He is the founder of Sound Vision, an Islamic charity.
- The Sikh Coalition, which was founded on September 11, 2001 to, *inter alia*, ensure religious liberty for all people.
- The seven United States Franciscan provinces of the Order of Friars Minor ("OFM"), a Franciscan order that strives to bring the Gospel into the everyday experience of men and women through a life in fraternity and compassionate service to all:
    - Very Rev. James Gannon, OFM Provincial Minister, for the Assumption of the Blessed Virgin Mary Province, Franklin, WI.
    - Very Rev. Kevin Mullen, OFM Provincial Minister, for the Holy Name Province, New York, NY.
    - Very Rev. Robert Campagna, OFM Provincial Minister, for the Immaculate Conception Province, New York, NY.
    - Very Rev. Jack Clark Robinson, OFM Provincial Minister, for the Our Lady of Guadalupe Province, Albuquerque, NM.

- Very Rev. William Spencer, OFM Provincial Minister, for the Sacred Heart Province, St. Louis, MO.
- Very Rev. David Gaa, OFM Provincial Minister, for the Saint Barbara Province, Oakland, CA.
- Very Rev. Jeff Scheeler, OFM Provincial Minister, for the Saint John the Baptist Province, Cincinnati, OH.

- The Right Reverend Lawrence C. Provenzano, the Episcopal Bishop of Long Island. The Episcopal Diocese of Long Island has ecclesiastical jurisdiction over Brooklyn and Queens in New York City, and the counties of Nassau and Suffolk in the state of New York.
- The Right Reverend Marc Handley Andrus, the Episcopal Bishop of California. The Episcopal Diocese of California has ecclesiastical jurisdiction over San Francisco, Alameda, Contra Costa, Marin, and San Mateo Counties, along with the northernmost portion of Santa Clara County, in California.
- Rabbi Joy Levitt, the Executive Director of JCC Manhattan.
- Reverend Curtis W. Hart, Editor-in-Chief of the *Journal of Religion and Health* and Lecturer in the Departments of Medicine and Psychiatry, Division of Medical Ethics, at Weill Cornell Medical College.
- Congregation Beit Simchat Torah, a non-affiliated Jewish synagogue in New York City

that serves Jews of all sexual orientations and gender identities.

- Rabbi Sharon Kleinbaum, the Senior Rabbi of the Congregation Beit Simchat Torah in New York City.
- Reverend Timothy B. Tutt, Senior Minister at the Westmoreland Congregational United Church of Christ in Bethesda, Maryland.
- Rabbi Joel Mosbacher, the Senior Rabbi of Temple Shaaray Tefila in New York City.
- Rabbi Frederick Reeves, the Rabbi of the KAM Isaiah Israel Congregation in Chicago.
- Rabbi Peretz Wolf-Prusan, the Chief Program Officer and a Senior Educator at Lehrhaus Judaicam, a non-denominational center for adult Jewish studies in San Francisco.
- Rabbi Noa Kushner, the leader of The Kitchen, a Jewish community building a spiritually alive generation and a new resonant approach to religious life in San Francisco.
- Union Theological Seminary, the oldest independent seminary in the United States. The seminary's education is rooted in Christian traditions but instructed by other faiths.
- Rabbi John Rosove, the Senior Rabbi of the Temple Israel of Hollywood in Los Angeles.
- United Methodist Women, the largest denominational faith organization for women with approximately 800,000 members whose mission is fostering spiritual growth, developing leaders, and advocating for justice.

- Rabbi James Ponet, the emeritus Howard M. Holtzmann Jewish Chaplain at Yale University.
- The Hyde Park & Kenwood Interfaith Council, which, since its founding in 1911, has strived for the increased efficiency of the spiritual forces of our community along cooperative lines. The Council's members agree to respect the integrity of their different faiths and the right to practice their beliefs.
- Rabbi Michael Strassfeld, Rabbi Emeritus of the Society for the Advancement of Judaism, a Manhattan synagogue.
- IKAR, a leading edge Jewish community in Los Angeles that seeks to inspire people across the religious spectrum.
- Rabbi Sharon Brous, the founder and Senior Rabbi of IKAR.
- Reverend Jeannette DeFriest, Rector of St. Luke's Episcopal Church, Evanston, Illinois.
- Rabbi Amichai Lau Lavie, founding spiritual leader of Lab/Shul NYC, an organization that seeks to redefine the role of sacred gatherings that nourish our thirst for meaning, connection, spirituality, and community.
- Imam Suhaib Webb, former imam of the Islamic Society of Boston Cultural Center, the largest mosque in New England.
- Rabbi Ayelet Cohen, the Senior Director of New Israel Fund's New York/Tri-State Region. Rabbi Cohen is the former Director of The

Center for Jewish Living and The David H. Sonabend Center for Israel at JCC Manhattan.

- Hyattsville Mennonite Church, a Christian congregation in the Washington, D.C. area that seeks to break down the divisions of economic and social status, sexuality, gender, race, ethnicity, culture, education, age, mental and physical health, and religion, in order to build a more diverse and complete faith community.
- Women's Alliance for Theology, Ethics, and Ritual, a center for dialogue on feminism, faith, and justice that connects activists, religious leaders, students, scholars, and allies who are using feminist religious values to create social change.
- Reverend Julie Windsor Mitchell, the Campus Minister of the University Christian Ministry at Northwestern University.
- The Baptist Joint Committee for Religious Liberty, a religious liberty education and advocacy organization comprised of 15 national and state Baptist conventions and conferences and congregations throughout the country, focuses exclusively on church-state issues and has worked to promote vigorous enforcement of both the Establishment and Free Exercise Clauses to ensure religious liberty for all since 1936.

SUMMARY OF ARGUMENT

Two documents establish the Establishment Clause violation in this case. The first is the March 6, 2017 Executive Order itself.[2] The second is a report of the State Department, the *Country Reports on Terrorism 2015* (the "Report").[3] The Executive Order expressly states that the Report informs the selection of the six Muslim-majority nations for inclusion under the travel ban imposed by Section 2(c) of the Order.

Taken together, these two documents compel one conclusion: that six Muslim-majority nations were selectively targeted for the travel ban. This is demonstrated by the fact that at least two Christian-majority nations, Venezuela and the Philippines, were not included in the ban. This omission is striking. According to the Report, these two counties satisfy the criteria the Executive Order purports to apply when determining whether a country should be subject to the ban. Indeed. the Report reveals that Venezuela and the Philippines allegedly satisfy these criteria by a greater margin than at least one of the Muslim-majority nations included in the ban.

To be clear, *Amici* do not vouch for statements in the Report. *Amici* do not contend that Venezuela or the Philippines should be included in the travel ban. Nor do they purport to second guess the

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[2] *Protecting the Nation From Foreign Terrorist Entry Into the United States*, Exec. Order No. 13.780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[3] U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism. Country Reports on Terrorism 2015 (June 2016). https://www.state.gov/documents/organization/258249.pdf.

Administration's assessment of the security risks posed by various countries. *Amici* merely contend that if the criteria set forth in the Executive Order are applied fairly, and the factual basis of the Executive Order's determination is set forth primarily (if not entirely) in the Report, then there is no principled basis for the Executive Order's "Muslim only" list.

This analysis is sufficient to establish a violation of the Establishment Clause. At the very least, the selective burdening of one nation over another opens the door to consideration of the intent of the drafter of the travel ban. In such circumstances, the Court must carefully scrutinize the statements of President Trump to determine whether the purpose of the travel ban violates the Establishment Clause.

ARGUMENT

I. The Establishment Clause Forbids National Security Laws That Selectively Burden One Religion

A. The Establishment Clause Bars Even Facially Neutral Laws From Burdening One Religion and Not Another

Under the Establishment Clause, the government cannot prefer one religion over another. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither [a state nor the Federal

Government] can pass laws which . . . prefer one religion over another."); *cf. Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion . . . .").

The government also cannot hide behind facial neutrality and claim that a law which burdens one religion over another is constitutional simply because it does not mention religion. The court's analysis "does not end with the text of the statute at issue." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994). Rather, a facially neutral law that imposes arbitrary distinctions that are not explained by the law's alleged purpose, but instead are designed to burden or benefit one religion over another, runs afoul of the First Amendment. *See Larson*, 456 U.S. at 255.

To root out the true nature of a facially neutral law, courts look to both the structure and history of the law. In *Larson*, for example, the Court noted that the structure of the challenged regulation appeared to create an arbitrary distinction between religions. *Id.* at 252. In particular, the law exempted certain religions that received fifty percent of their contributions from members or affiliated organizations from a requirement to register with and provide the state with annual financial reports. *Id.* at 231-32. The Court looked to the legislative history and found that the drafters had sought to avoid imposing a burden on the Catholic Church. *Id.* at 254. After considering the structure and history of the

"fifty percent rule," the Court concluded that the rule served no legitimate purpose and violated the Establishment Clause. *Id.* at 255.

B. The Establishment Clause Applies with Full Force in the Immigration and National Security Context

Although the Executive Order regulates immigration and purports to rest on national security grounds, those factors do not alter the Establishment Clause analysis. The political branches have considerable authority over immigration, but that power "is subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also INS v. Chadha*, 462 U.S. 919, 941 (1983) (affirming courts' authority to review whether the federal government "has chosen a constitutionally permissible means of implementing" its power to regulate immigration). Moreover, this Court has often reviewed the constitutionality of, and struck down, measures taken to promote national security. *See, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008) (striking down law that stripped federal courts of jurisdiction to review habeas petitions of enemy combatants detained at Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that enemy combatants held at Guantanamo Bay had the right to challenge the factual basis of their detention); *United States v. Robel*, 389 U.S. 258 (1967) (striking down law making it unlawful for members of Communist organizations to be employed at defense facilities).

The courts have applied this principle in the circumstances of this case. After the Trump Administration issued the first version of this Executive Order,[4] which similarly burdened individuals from seven Muslim-majority countries (Iran, Iraq, Syria, Libya, Yemen, Sudan, and Somalia), lawsuits were filed across the country challenging its constitutionality. In addressing these suits, courts reaffirmed that it is "beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action," *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), and that the Executive Order "must still comply with . . . the constraints of the Constitution, including the Bill of Rights," *Aziz v. Trump*, 234 F. Supp. 3d 724, 732 (E.D. Va. 2017).

The same analysis applies to the revised Executive Order, which continues to burden individuals from six of the seven Muslim-majority countries singled out in the original Order. Regardless of the immigration and national security justifications proffered by the Administration, the Court must still adjudicate the constitutionality of the Order. In doing so, the Court is not bound by the justifications offered by the government, and should conduct a regular Establishment Clause analysis. As set forth below, this analysis reveals that the Executive Order unconstitutionally burdens Muslims.

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[4] *Protecting the Nation from Foreign Terrorist Entry Into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

II. Section 2(c) of the Executive Order Selectively Burdens Muslim-Majority Countries While Exempting Comparable Christian-Majority Countries

A. The Executive Order's Selection Criteria and its Reliance on the Report

1. Requirements of Section 1(d)

Section 1(d) of the Executive Order states that the six Muslim-majority countries were chosen for the travel ban "because the conditions in these countries present heightened threats." Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. This constitutes an evolution in the Administration's articulation of its approach to the travel ban.

Section 1(b)(i) of the Executive Order notes that the six counties were among the seven identified in the January 27, 2017 Executive Order 13,769, which relied upon the countries designated under section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1187(a)(12). Exec. Order No. 13,780, 82 Fed. Reg. at 13,209. That statutory provision concerns restrictions on eligibility for the Visa Waiver Program. Pursuant to section 217(a)(12), persons who are citizens of one of these six countries (or Iraq), or who have visited these countries in the last five years, are ineligible to participate in the Visa Waiver Program. Instead, if they wish to enter the United States as nonimmigrant visitors, they must apply for a visa. *See* 8 U.S.C. § 1182(a)(7)(B)(i)(II); *id.* § 1187(a). Of course, this statutory provision stops well short of imposing a blanket travel ban.

Section 1(d) of the revised Executive Order seeks to address this problem with the original Executive Order by offering a further justification of the travel ban. The new Executive Order asserts that the six Muslim-majority selected countries "warrant additional scrutiny" when viewed in light of the following four factors:

> [1] Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.
>
> [2] Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States.
>
> [3] Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.
>
> [4] Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. As set forth in the next section, the first three of these factors are discussed in the State Department's Report,

which is expressly cited in Section 1(e) of the Executive Order.

Factor One. The Executive Order states that a critical criterion for determining whether a country would be selected for inclusion in the travel ban was that a nation must be either (1) "a state sponsor of terrorism"; (2) "significantly compromised by terrorist organizations"; or have (3) "active conflict zones." Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. The second category encompasses "terrorist safe havens,"[5] which are defined in the Report as including "ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security because of inadequate governance capacity, political will, or both." Report at 307.

Factors Two and Three. The second and third factors on which the Executive Order purports to base its decision to select the six Muslim-majority nations are: (a) an inability or unwillingness to share information about individuals seeking to travel to the United States, and (b) the significant presence of terrorist organizations and the risk that terrorist activity will be exported to the United States.

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[5] The Executive Order's description of why Somalia should be included in the scope of the Executive Order is illustrative. There is no assertion that it is a state sponsor of terrorism or is an active conflict zone. Instead, the Executive Order states that "[p]ortions of Somalia have been terrorist save havens." Exec. Order No. 13,780, 82 Fed. Reg. at 13,211.

2. Section 1(e) and the Report

Section 1(e) of the Executive Order explains the reasons why the six selected Muslim-majority nations qualified for a travel ban by applying the criteria of Section 1(d). Section 1(e) states that the information recited in the Executive Order was taken "in part" from the Report. Exec. Order No. 13,780, 82 Fed. Reg. at 13,210. No other document is cited. Indeed, much of Section 1(e)'s descriptions of the selected Muslim-majority nations are identical to those in the Report.

On these facts, the Report is an appropriate and indeed critical reference with which to construe the meaning and operation of the Order. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (both the majority and dissent closely scrutinized whether a study, mentioned in a city ordinance as justification for the ordinance, actually supported the purported reason for the regulation).

B. According to the Report, Venezuela and the Philippines Satisfy the Criteria of Section 1(d)

Careful analysis of the Report demonstrates that the Administration has not consistently applied the criteria set forth in Section 1(d). Specifically, a review of the Report reveals that at least two Christian-majority nations—Venezuela and the Philippines—allegedly satisfy the three operative factors set forth in Section 1(d), but were not subjected to the travel ban.

As noted above, *Amici* take no position on whether or not these two nations should be subject to

a travel ban or whether the criteria stated in the Executive Order regarding the selected countries are, or are not, the right criteria. Nor do *Amici* vouch for the representations made in the Report. Rather, the analysis of Venezuela and the Philippines set forth below simply demonstrates that the Administration has taken an inconsistent approach to selecting nations for the travel ban that selectively favors Christian-majority countries over Muslim-majority countries. This renders Section 2(c) of the Executive Order fatally defective under the Establishment Clause.

1. Application of the Section 1(d) Factors to the Report's Allegations Regarding Venezuela

Factor One: Terrorist Safe Haven. The Report bases its determination that Venezuela is a safe haven for terrorism on purportedly "credible reports that Venezuela maintained a permissive environment that allowed for support of activities that benefited known terrorist groups." Report at 314-15; *see also* Report at 297. Such groups are said to include the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army, and Basque Fatherland and Liberty, "as well as Hizballah supporters and sympathizers." Report at 297.

According to the Report, the United States has repeatedly sought the assistance of Venezuela in combating terrorism. For the tenth year in a row, however, Venezuela has been deemed "not cooperati[ve]," Report at 297, and has been ineligible to purchase or license any "defense article or defense

service" from anywhere within the United States under the Arms Export Control Act, 22 U.S.C. § 2781(a).

Factor Two: Unable and Unwilling to Share or Validate Important Information About Individuals Seeking to Travel to the United States. The Report states that in Venezuela, "[b]order security at ports of entry is vulnerable and susceptible to corruption," and specifically calls attention to the "lack of government transparency." Report at 297. According to the Report, the "government routinely did not perform biographic or biometric screening at ports of entry or exit," and there was "no automated system to collect advanced Passenger Name Records on commercial flights or to cross-check flight manifests with passenger disembarkation data." Report at 297. Moreover, as noted above, the Report states that Venezuela has (for the last ten years) been "not cooperat[ive]" with U.S. anti-terrorism efforts. Report at 297.

Factor Three: Significant Presence of Terrorist Organizations and Risk of Terrorists Travelling to the United States. The Report states that Venezuela provides a fertile environment for terrorist organizations such as FARC, the National Liberation Army, and Basque Fatherland and Liberty, "as well as Hizballah supporters and sympathizers." Report at 297, 314-15. Reporting such conditions about a country so close to the United States suggests that the State Department believes that there is a serious concern that "conditions will be exploited to enable terrorist operatives or sympathizers to travel [from

Venezuela] to the United States." *Cf.* Exec. Order No. 13,780, 82 Fed. Reg. at 13,210.

2. Application of the Section 1(d) Factors to the Report's Allegations Regarding the Philippines

Factor One: Terrorist Safe Haven. According to the Report, the Filipino government receives substantial assistance from several American agencies, and it closely cooperates with both the United States government and international organizations to combat terrorism. Report at 80-84. Nonetheless, the country's composition of over 7,100 islands "makes it difficult for the central government to maintain a presence in all areas." Report at 309. Thus, according to the Report, several militant groups, including Abu Sayyaf Group (ASG), Jemaah Islamiya, Bangsamoro Islamic Freedom Fighters (BIFF), the Ansarul Khilafah Philippines (AKP), and the New People's Army, are able to operate out of "base locations" in the Southern Philippines. Report at 78-79, 309.

The Report also focuses on the Sulu/Sulawesi Seas Littoral, an island/maritime region that straddles Indonesia, Malaysia, and the Philippines, and is said to be home to many of the identified terrorist groups. Report at 308. Per the Report, "the expanse remain[s] difficult to control," and any surveillance is "partial at best," as historic smuggling and piracy "provide[] an effective cover for terrorist activities, including the movement of personnel, equipment, and funds." Report at 308. The Report refers to this region as "an area of concern for WMD

proliferation and transit" due in part to "[w]eak strategic trade controls, legal and regulatory frameworks, [and] inadequate maritime law enforcement and security capabilities." Report at 308.

Factor Two: Unable to Share or Validate Important Information About Individuals Seeking to Travel to the United States. The Report states that the government of the Philippines has made progress in improving its border security and collaborates closely with the United States and regional groups in doing so. Report at 80-84. Nonetheless, despite this willingness to collaborate with the United States, per the Report, the government is unable to monitor "the movement of personnel, equipment, and funds." Report at 308.

According to the Report, this inability to verify this information is due in part to difficulties in international cooperation and poor surveillance capabilities in the Sulu/Sulawesi Seas Littoral. Report at 308. It is also due to the country's geographic composition, which "makes it difficult for the central government to maintain a presence in all areas." Report at 309. At the time the Report was published, "violent opposition" and a "continued heavy military and police presence" allegedly remained in the southern islands. Report at 78. Moreover, the Report also notes that law enforcement and counterterrorism agencies lack necessary equipment, have a "mixed record of accountability," are "under-resourced and understaffed," and suffer from "widespread official corruption." Report at 80, 82.

Factor Three: Significant Presence of Terrorist Organizations and Risk of Terrorists Travelling to the United States. The Report states that "ISIL was attempting to recruit Filipinos," and that some of the Filipino-based groups including ASG, AKP, and BIFF, "have publicly pledged allegiance to ISIL." Report at 79. According to the Report, in 2015, these groups "displayed ISIL-affiliated images and conducted some of ISIL's most reprehensible practices—including the beheading of hostages." Report at 79. The Report also states that in 2015, terrorist groups in the Southern Philippines engaged in kidnappings of both locals and foreigners, roadside bombings, and the seizing of private vessels and Coast Guard ships. Report at 79-80.

The Report states that these groups export terrorist activity. According to the Report, these Filipino-based groups were responsible for high-profile terrorist attacks, including several outside of the Philippines. These include:

- The 2002 Bali bombings which killed more than 200, including 7 U.S. citizens;
- The October 2002 bombing near a military base that killed an American soldier;
- The August 2003 bombing of the J.W. Marriott Hotel in Jakarta;
- The September 2004 bombing outside the Australian Embassy in Jakarta;
- The October 2005 suicide bombing in Bali that killed 26; and,

- The July 2014 firing upon civilians celebrating the end of Ramadan with assault rifles that left 21 individuals dead.

Report at 352, 380.

C. According to the Report, Venezuela and the Philippines Present a Greater Section 1(d) Risk than Does Sudan

If the allegations of the Report are credited, both Venezuela and the Philippines satisfy the three operative factors of Section 1(d) of the Executive Order. They were nonetheless exempted from the travel ban. This exclusion occurred even though the Report—the sole source cited as support for the inclusion of the six Muslim-majority countries—sets forth allegations that suggest Venezuela and the Philippines are greater threats to the national security of the United States than is Sudan.

By including Sudan and excluding two Christian-majority nations, Venezuela and the Philippines, the Administration's policy is internally and fatally inconsistent.[6] This inconsistency demonstrates that a country's predominant religion is the real basis for its inclusion in the travel ban.

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[6] As noted above, *Amici* take no position on the Administration's assessment of the national security risk posed by Sudan.

1. Basis for Sudan's Inclusion

Section 1(e)(iv) of the Executive Order, relying on information from the Report, is the paragraph used to justify Sudan's inclusion in the travel ban:

> Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

Exec. Order No. 13,780, 82 Fed. Reg. at 13,211. The Report provides only slightly more detail than this paragraph, and significantly less detail than the information provided for Venezuela and the Philippines. *See* Report at 301.

2. A Comparison of the Report's Account of the Three Nations Confirms that the Executive Order Violates the Establishment Clause

a) Factor 1: State Sponsors of Terrorism/Safe Havens

If one accepts the statements of the Executive Order and the Report, all three countries appear to satisfy the first criterion. A careful reading of those materials, however, reveals a significant

distinction. Sudan is designated as a state sponsor of terrorism, but such designation is based on historical facts. It was designated as a state sponsor of terrorism in 1993, when it "served as a meeting place, safe haven, and training hub for international terrorist groups." Report at 301. Per the Executive Order and the Report, Sudan has changed its posture significantly since that time. Report at 301 ("Sudan's support to al-Qa'ida has ceased" and "[t]he United States and Sudan worked cooperatively in countering the threat posed by al-Qa'ida and ISIL in 2015."); Report at 301 (noting that "the use of Sudan by Palestinian designated terrorist groups appeared to have declined"); Exec. Order No. 13,780, 82 Fed. Reg. at 13,211 ("Sudan's support to al-Qa'ida has ceased.").

By contrast, both Venezuela's and the Southern Philippines' status as terrorist safe havens are based on *current* facts. The Report notes that Venezuela "maintained a permissive environment that allowed for support of activities that benefited known terrorist groups" *in 2015*. Report at 297. Similarly, the Report details how the Philippines has been unsuccessfully attempting to eradicate terrorist safe havens in the southern islands *in 2015*. Report at 80-84, 308-09.

Put simply, if Sudan satisfies the first Section 1(d) factor, then—in the view of the Report—Venezuela and the Philippines do as well.

b) Factor 2: Ability and Willingness to Share and Validate Information

While Venezuela has been unwilling to cooperate with the United States in combatting terrorism, and the Filipino government has been unable to validate important information, "[t]he United States and Sudan worked cooperatively in countering the threat posed by al-Qa'ida and ISIL in 2015, which included their use of transit and facilitation routes within the country." Report at 301.

Sudan is also reported to be a member of the Partnership for Regional East Africa Counterterrorism (PREACT), a United States-funded program "designed to build counterterrorism capacity and cooperation of military, law enforcement, and civilian actors across East Africa to combat terrorism." Report at 13. This stands in stark contrast to Venezuela's reported lack of cooperation for ten consecutive years, Report at 297, and the Filipino government's apparent inability to establish domain over the southern islands, Report at 308-09.

Again, if Sudan satisfies the second Section 1(d) factor, then (in the view of the Report) Venezuela and the Philippines clearly do so as well.

c) Factor 3: Risk That Terrorists Will Travel to the United States

While terrorist organizations continue to operate in Sudan, their presence is alleged by the Report to be greater in the Philippines. The Report

provides a one-sentence description of terrorism in Sudan: "elements of al-Qa'ida and ISIL-linked terrorist groups remained active in Sudan in 2015."[7] Report at 301. The only other recent reference to terrorist activity is an attempted Hamas arms shipment in 2014. Report at 301.

Once again, when compared to the Report's description of kidnappings, roadside bombings, and the seizing of private and Coast Guard Ships in the Philippines, *see* Report at 79-80, or its description of Venezuela's "permissive environment" for "known terrorist groups." Report at 297, the point is quite simple: if Sudan satisfies Factor Three according to the information in the Report, the two Christian-majority nations clearly do so as well.

III. In Light of This Selective Burden Imposed Only on Muslim-Majority Nations, the Court Should Look to the Statements of the Drafters to Determine Its Purpose

When read in light of the Report on which it relies, it is apparent that Section 2(c) of the Executive Order selectively disfavors Muslim-majority countries as compared to similarly-situated non-Muslim countries.[8] The Executive Order's "express design" is

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[7] As with Sudan, the Report does not list any instances of specific terrorist activity that took place in Venezuela. *See* Report at 297-98, 314-15.

[8] A review of the most recent Country Report (released July 2017) indicates that the incongruity set forth above has not changed. *See* U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016.

"to burden or favor selected religious denominations." *Larson*, 456 U.S. at 255. Accordingly, the Executive Order is in clear violation of the Establishment Clause.

The Administration denies that this is the purpose of the Executive Order. While "the government's characterization is . . . entitled to some deference . . . it is nonetheless the duty of the court to distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citation and quotation marks omitted); *see also McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005). Courts determine the purpose of a law by considering its history, including statements made by its drafters. *Larson*, 456 U.S. at 254; *Grumet*, 512 U.S. at 699-70. Once the discriminatory impact of the Order has been

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at 301-02 (July 2017), https://www.state.gov/documents/organization/272488.pdf (describing Venezuela, and alleging that "Venezuela was not cooperating fully with U.S. counterterrorism efforts" and "credible reports that Venezuela maintained a permissive environment that allowed for support of activities that benefited known terrorist groups"); *id.* at 83-88 (describing the Philippines and recognizing that "domestic and international terrorism remained a serious problem"); *id.* at 305-06 (describing Sudan and recognizing that "[t]here were no reported terrorist attacks in Sudan in 2016 . . . [or] indications that the Sudanese government tolerated or assisted terrorist organizations within its borders," while commending Sudan for being "a cooperative partner of the United States on counterterrorism" and for making "countering terrorism . . . a national security priority"). Again, *Amici* wish to stress that they are not vouching for statements in the State Department's Report or advocating that a particular country be included in the travel ban. Rather they merely note that the Report the government purportedly relied upon did not support the government's position at the time the Executive Order was drafted, and the annual update of the Report, *see* 22 U.S.C. § 2656f, continues to contradict the government's position.

established, the Court may look behind the Executive Order to determine whether it has a discriminatory purpose that runs afoul of the Establishment Clause.

Here, the intention of at least one of the Defendants to burden a particular religion was articulated publicly. Defendant President Trump's comments related to this Executive Order have made it clear that his intention is to discriminate against Muslims. *See, e.g.*, *Washington*, 847 F.3d at 1167-68 (finding that the States' Establishment Clause claim raised "serious allegations" and "significant constitutional questions" because of "evidence of numerous statements by the President about his intent to implement a 'Muslim ban' as well as evidence [suggesting] that the Executive Order was intended to be that ban"); *see also Aziz*, 234 F. Supp. 3d at 737 (looking to statements made during and after the election by President Trump. and the "dearth of evidence indicating a national security purpose," and concluding that the original Executive Order was likely intended to be a "Muslim ban").

CONCLUSION

For the foregoing reasons, the Executive Order should be invalidated as violating the Establishment Clause. In the alternative, the Court should consider the extrinsic statements of the President regarding the purpose of the Order to evaluate its constitutionality.

Respectfully submitted,

Robert D. Fram
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111

Robert Long
Counsel of Record
Ligia Markman
Karun Tilak
Michael Baker
Andrew Guy
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
rlong@cov.com
(202) 662-6000

Counsel for Amici Curiae Interfaith Coalition

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